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In the Matter of)
)
Reexamination of the Comparative) MM Docket No. 95-31
Standards for Noncommercial)
Educational Applicants)

To: The Commission

COMMENTS OF KALEIDOSCOPE FOUNDATION, INC.

Kaleidoscope Foundation, Inc. ("Kaleidoscope"), pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, respectfully submits these Comments in response to the Further Notice of Proposed Rule Making in the above-captioned proceeding.^{1/}

A. Kaleidoscope Is An Interested Party.

Kaleidoscope is an applicant for construction permits for new noncommercial full power television broadcast stations in Salt Lake City, Utah, Memphis, Tennessee, Russellville, Arkansas, Pocatello, Idaho, Woodward, Oklahoma, and El Dorado, Arkansas, for which there are competing applicants. Therefore, Kaleidoscope is interested in this proceeding and the rules the Commission may adopt for resolving such mutually exclusive applications.

^{1/} See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, MM Docket No. 95-31, Further Notice of Proposed Rule Making, FCC 98-269 (released October 21, 1998) ("FNPRM"). Comments may be filed on or before January 28, 1999. See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, MM Docket No. 95-31, Order, DA 98-2489 (released December 3, 1998). Therefore, these comments are timely filed.

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B. Past Practices and Proposed Rules

In the past, when an NCE applicant filed an application for a construction permit for a new station on a vacant nonreserved channel, the NCE applicant did so with the understanding that if competing mutually exclusive commercial applications were filed for the nonreserved channel, its application would be evaluated using the selection criteria used for commercial applications, due to the requirement of ensuring "comparable treatment of similarly situated applicants".^{2/} After the use of comparative criteria in licensing proceedings was called into question in the commercial broadcast context in *Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir. 1992), *on appeal* 10 F.3d 875 (D.C. Cir. 1993), Congress authorized auctions for commercial broadcast licenses.^{3/} Congress prohibited auctions for NCE permits, but preserved authority for the FCC to grant NCE permits through lotteries.^{4/}

In the *FNPRM*, the Commission seeks comment on three options in granting NCE permits in situations involving competing applications – comparative hearings, lotteries and a point system. Kaleidoscope agrees with the Commission's tentative conclusion that comparative hearings should no longer be used to select among mutually exclusive NCE applicants. Thus, these comments will principally address the use of lotteries and a point system to make such a selection.

^{2/} See *FNPRM* at ¶¶ 4, 34 and n.31; *see also*, *Melody Music, Inc. v. FCC*, 345 F.2d 730, 4 RR 2d 2029 (D.C. Cir. 1965).

^{3/} See *Balanced Budget Act of 1997*, Pub. L. No. 105-33, 11 Stat. 251 (1997) ("*Balanced Budget Act*").

^{4/} *Balanced Budget Act* §3002(a), *codified as* 47 U.S.C. §309(i)(5)(B) (1998), and 47 U.S.C. §309(j)(2)(C) (1998).

C. **A Hybrid Lottery/Auction System Should Be Used To Choose Among Commercial and Noncommercial Applicants Competing for Commercial Spectrum.**

Where both NCE and commercial applicants are competing for commercial spectrum, Kaleidoscope supports a hybrid lottery/auction system similar to, but not precisely the same as, that proposed by the Commission.^{5/} An initial lottery among all applicants (NCE and commercial alike) should be held.^{6/} If an NCE applicant wins the lottery, the FCC should issue a noncommercial license to that NCE entity. If, on the other hand, an NCE applicant does *not* win the initial lottery, an auction should be held among all applicants (including NCE applicant(s)). Regardless of which applicant wins the auction, the winning applicant would be granted a commercial license.

Alternatively, all applicants in the proceeding (including NCE applicants) could participate in an auction. If the NCE applicant wins, it would pay the amount of its winning bid and would be issued a commercial license. Congress prohibited auctions only to choose among applicants for NCE permits, not commercial permits. Thus, the participation by NCE applicants in auctions for commercial spectrum is not prohibited by the *Balanced Budget Act* and may be adopted. However, because NCE applicants often have far fewer financial resources than commercial applicants, Kaleidoscope submits that the hybrid lottery/auction approach to select among NCE and commercial applicants for commercial spectrum is more equitable and thus preferable.

^{5/} *FNPRM* at ¶ 43.

^{6/} To the extent permitted by law, lottery participants should also receive preferences for female ownership in addition to the proposed minority preferences.

D. Lotteries Should Be Used To Choose Among Applicants For Reserved NCE Spectrum.

In choosing among applicants for reserved NCE spectrum, Kaleidoscope strongly supports the use of lotteries. Furthermore, in weighting such a lottery, the Commission should prefer applicants with female ownership, as well as minority ownership, to the extent the law permits such preferences.

Kaleidoscope also believes that there should be no limit on the number of NCE lotteries in which an applicant may participate. Because of the very random nature of a lottery, it is conceivable that a party could participate in any number of lotteries, without limitation, and not win any of them. Statistically, an applicant does not have any better chance to win one lottery versus the next, regardless of how many lotteries an applicant participates in. Moreover, since there should be no limit on the number of applicants that can participate in any given lottery, the Commission should not restrict the number of lotteries in which any one applicant may participate.

To ensure that the new application process is meaningful and to avoid speculation in NCE permits, the Commission proposed that there be a prescribed holding period for those permits. Kaleidoscope supports the proposed five-year holding period, after the station is built and on the air,^{2/} for NCE licenses awarded on the basis of a lottery preference or point system. When a station is transferred before the end of the prescribed holding period, the Commission should require that the purchase price of the permit not exceed the reasonable and prudent expenses of the transferor and that the transfer be allowed only between unaffiliated entities. Reasonable and prudent expenses should include any reasonable costs incurred, such as (but not limited to) the cost

^{2/} *FNPRM* at ¶ 31.

prosecuting the application for construction permit, the costs of constructing the station, and all costs of station operation to that point, if applicable.

E. **Conclusion**

WHEREFORE, for the reasons stated herein, Kaleidoscope respectfully requests that the Commission adopt rules for resolving mutually exclusive applications for NCE broadcast stations consistent with the comments of Kaleidoscope expressed above.

Respectfully submitted,

KALEIDOSCOPE FOUNDATION, INC.

By: 

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January 28, 1999